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10
11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF WASHINGTON**
AT SPOKANE

13 STATE OF WASHINGTON, *et al.*,

14 Plaintiffs,

15 v.

16 UNITED STATES DEPARTMENT OF
17 HOMELAND SECURITY, *et al.*,

18 Defendants

No. 4:19-cv-5210-RMP

NOTICE OF SUPPLEMENTAL
AUTHORITY

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NOTICE OF SUPPL. AUTHORITY

U.S. DEPARTMENT OF JUSTICE
1100 L St. NW, Washington, DC, 20003
(202) 353-0533

1 Defendants respectfully submit this notice to inform the Court of a recent decision
2 by the U.S. District Court for the Northern District of Illinois that is relevant to Plaintiff's
3 Motion to Compel Documents Withheld Under Deliberative Process Privilege, ECF No.
4 255. The decision was issued in a case involving a parallel challenge to the same
5 Department of Homeland Security rule (the "Rule") that is at issue here.

6 In *Cook County v. Wolf*, No. 19-6334, ECF No. 235 (N.D. Ill. Dec. 15, 2020),
7 attached hereto as Exhibit A, the court denied the plaintiff's request to order Defendants
8 to produce all documents withheld in that case under the deliberative process privilege.
9 The plaintiff argued, as do Plaintiffs here, "that the privilege is categorically unavailable
10 in this case because DHS's motivation for promulgating the Rule lies at the heart of the
11 equal protection claim." *Id.* at 2. And the plaintiffs relied heavily, as do Plaintiffs here,
12 on *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d
13 1422 (D.C. Cir. 1998), modified on reh'g, 156 F.3d 1279 (D.C. Cir. 1998).

15 The *Cook County* court, however, rejected the plaintiffs' argument and held that
16 "the question 'whether an exception [to a privilege] applies must be addressed and
17 resolved one lawsuit—indeed, one document—at a time.'" Ex. A at 3 (quoting *United*
18 *States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004)). The court stated that it will
19 determine "on a document-by-document basis, whether to sustain or overrule DHS's
20 assertions of the deliberative process privilege." Ex. A at 4.

22 The decision in *Cook County* is now the second ruling to deny a request to hold the

1 deliberative process privilege categorically inapplicable in litigation relating to the Rule.
2 *See also New York v. U.S. Dep't of Homeland Sec.*, No. 19-cv-7777, Order at 2 (S.D.N.Y.
3 Oct. 23, 2020).

4
5 Dated: December 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all users receiving ECF notices for this case.

/s/ Joshua Kolsky

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